PUBLICATIONS OF
THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE.
No. 172.

Issued Fortnightly. May 5, 1896.

A REVIEW

OF

Bryce's American Commonwealth,

A Study in American Constitutional Law.

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A PAPER SUBMITTED TO THE

AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE

PHILADELPHIA:

AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE.

ENGLAND: P. S. King & Son, 12 and 14 ... g St., Westminster, London, S. W.
FRANCE: L. Larose, rue Soufflot 22, Paris. GERMANY: Gustav Fischer, Jena.
ITALY: Direzione del Giornale degli Economisti, Rome, ... a Ripetta 102.
SPAIN: E. Capdeville, 9 Plaza de Santa Aña, Madrid.

Price, 25 cents. *Annual Subscription, $6.00.*

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BRYCE'S

"American Commonwealth."

Bryce's "American Commonwealth" is a unique work. It is not only a comprehensive account, at once intelligent and intelligible, of the political institutions of one great nation by a member of another; but it is also the best of all such accounts, either in our own or other literatures. It is also worthy of remark that it proceeds from a nation whose leading citizens have not been noted for their sympathy for and appreciation of American conditions, either political or social. The book is remarkable for the mastery of details, the firm grasp of general principles, and a deep and pervasive sympathy with the institutions which are described, which is as rare as it is refreshing. It is doubtless the ability, arising from such sympathy, to put himself into the position of an American observer and to look at things for the time being from an American point of view, which carries the author so successfully through many an obscure and difficult portion of his subject.

Mr. Bryce has not only succeeded in presenting an able exposition of matters on which previous writers, both native

and foreign, had written much; but he enters with equal success fields in which the systematic material is very meagre, and treats subjects in a most satisfactory way which no previous writer has attempted to discuss in a scientific manner. No one can read the work without conceiving a great admiration for the lucidity of exposition, the accuracy in matters of detail, and the comprehensiveness of the plan, as well as the success attending its execution. This admiration is increased by a second and third reading. It is also a noteworthy feature of the work that it is adapted, not only for the scholar, but also for the general reader, and is especially valuable for the college student who may desire to secure a general view of some of the most important aspects of our national life.

It is, therefore, in no spirit of carping criticism that an attempt is made in the following paper to point out certain inaccuracies of statement, and certain misleading features in the expositions. Foreigners will for a long time to come depend chiefly upon this book for their ideas of America and American institutions; a circumstance as fortunate for them as for us. But this fact makes it all the more necessary and desirable that even the small defects and errors, if such they be, which are discussed in the following pages, should be remedied in a new edition. Some of the points mentioned are evidently mere slips of the pen; some are views advanced because the author has followed leading and standard authorities in this country in their misconceptions and errors; while others relate to matters on which there are decided differences of opinion and inference. In a few cases the mere form of presentation is criticised where it seems likely to prove misleading to those foreigners whose knowledge of the subject matter treated is limited to this work.

The following paper deals exclusively with the first volume of the third edition. There are five general points as to which criticism will be offered in these pages: First, the

author's statement as to the basis of the classification of the distribution of functions between State and nation; second, his remarks on the subject of the responsibility of officials; third, his exposition of the judicial power of the United States; fourth, his formulation of the principles of constitutional interpretation; fifth, his views as to the final authority in interpreting the Constitution. There are various other subjects of minor importance which will be mentioned in the course of the discussion.

In treating of the distribution of functions between the Federal Government and the States, the author declares,* that "the administrative, legislative and judicial functions, for which the Federal Constitution provides, are those relating to matters which must be deemed common to the whole nation, either because all the parts of the nation are alike interested in them, or because it is only by the nation as a whole that they can satisfactorily be undertaken." This statement, taken in connection with other statements relating to the same subject, seems to imply, and would undoubtedly convey to a foreigner, the idea not only that those matters which are entrusted to the Federal Government are all of national and general interest, but also that all matters of general and national interest are entrusted to the Federal Government.

This is a very common form of describing the distribution of functions between the nation and the States, but it is erroneous. As a matter of fact, the actual distribution of functions between the Federal Government and the States, as the author suggests elsewhere, was the outcome of a struggle between those who were in favor of giving the Federal Government much more extensive powers than it now has, and those who were in favor of giving it still fewer. It would be highly improbable that as a result of such a struggle, all those subjects and only those subjects which were of national and general interest should have been actually

* P. 33.

assigned to the general government; while only those which were of special and local interest should have been assigned to the States. And it is, moreover, certain that even if an ideal distribution of this sort had been made in the first place, it would no longer be ideal after a century of development in which the relative importance of different subjects has been materially changed. As a matter of fact, however, many of the most important matters which are of national and general interest were not entrusted to the Federal Government. Surely the subject of a common commercial law, for example, or common marriage and divorce laws, is just as important as a common law of naturalization, a common bankruptcy law, and a common system of weights and measures, as to which subjects Congress has full power of legislation; although in regard to one of these it may be said never to have legislated at all, and in regard to another only temporarily and occasionally. All that can be said, therefore, in regard to the actual distribution of powers between the Federal Government and the State governments in our political system, is that certain general powers have been given to the Federal Government, being only those which commended themselves to the men who drew the Constitution as being absolutely necessary to the working of such a government as they were planning, or, possibly, in some instances those as to which one party yielded its convictions in the interest of compromise and conciliation.

How very different a modern distribution of functions between the Federal and State governments would be, if we had the subject before us anew, can be seen by comparing, in this respect, recent federal constitutions (*i. e.*, those made since 1870), with our own. The federal constitution of Germany, for example, or that of Switzerland, both reflect in their distribution of functions between State, and nation the economic and social conditions of the latter half of the nineteenth century, instead of those of the close of the eighteenth.

In discussing the subject of the responsibility of the President, his cabinet and other officials in the United States, the author expresses himself as follows: "In America, the President is responsible, because the minister is nothing more than his servant, bound to obey him and independent of Congress." * Further,† "the President is personally responsible for his acts, not indeed to Congress, but to the people by whom he is chosen. No means exist of enforcing this responsibility except by impeachment." In another place,‡ "if the resolution [of Congress] be one censuring the act of a minister, the President does not escape responsibility by throwing over the minister, because the law makes him, and not his servant or adviser, responsible." In another connection it is declared,§ that "every power in the state draws its authority, whether directly like the House of Representatives, or in the second degree like the President and Senate, or in the third degree like the federal judiciary, from the people, and is legally responsible to the people and not to any one of the other powers." Finally, speaking of State officials the author says,‖ that "they are in no sense a ministry or cabinet to the governor, holding independently of him, and responsible neither to him nor to the legislature, but to the people. They do not generally take his orders and need not regard his advice."

It is difficult to see how this exposition, in spite of various modifying and explanatory statements to be found elsewhere in the work, should not be confusing to a foreign student of our politics. The term "responsible" in political science and in constitutional discussions, has come to have a definite technical meaning which makes it improper to use it in describing the relations of the officials in the United States to the people.

* P. 91.
† P. 93
‡ P. 210.
§ P. 306.
‖ P. 497.

Looking for a moment at the President alone, there is no sense in which the term "responsible" is used in the discussions of political science in which the President can be fairly said to be responsible to the people at all. He is elected for a period of four years and during that period is as completely and absolutely out of the reach of law and legal process in his official capacity as President, as even the crowned heads of Europe. It is true that if the President desires to be re-elected, he may shape his policy with reference to the impression it will produce upon the voters of the country, or, at least, upon the politicians; but, so the German Emperor, if he desires to secure the passage of a bill through the German legislature, will act in such a way as, in his opinion, will contribute to that end, but he is not for that reason responsible, in any political sense, to the people. Even if the President might be said, in a certain sense, to be responsible in his first term, that is, so far as he may be affected by the desire to influence public sentiment in favor of securing a second term, certainly this cannot be said of his conduct during his second term with reference to a third. He knows full well that no conduct of his would be likely to secure a third term in the present temper and with the present political traditions of the people of the United States.

No power is given to individual citizens, or to the citizens taken collectively, or to the States individually, or to the States taken together, to control or supervise in any way the acts of the President. He is, so far as any of these elements in our political system are concerned, absolutely irresponsible. Nor can he be reached by any process of the court, and he is, therefore, in this sense, as truly above the courts and free from responsibility to them as any king in Europe. Indeed, one may say that in a certain sense the crowned heads of Europe are more immediately responsible to some power outside of themselves than is the President. If the German Emperor, for example, were to act in such a way as

to justify the opinion that he had become insane, a method is provided in the law by which he can be practically suspended from the exercise of his office and his power placed in the hands of a regent; but no such power is given under our Constitution to any political authority whatever. This question acquired a practical significance during the long illness of President Garfield. The President was in this instance certainly unable to discharge the powers and duties of his office, and in such cases the Constitution declares that they shall devolve upon the Vice-President. But the Constitution provides no way of determining when such a condition actually intervenes, nor does it give either to Congress or the Vice-President the right of initiative in the matter, and leaves the President, therefore, in control of the situation.

On the other hand, the President is undoubtedly responsible in a sense to Congress for his acts. Mr. Bryce states definitely that he is not responsible to Congress. Congress is authorized by the Constitution to impeach, convict and remove from office, a President, who, in their opinion, shall be guilty of treason, bribery, or other high crimes and misdemeanors. And, since, under our Constitution, Congress is made the absolute and final judge of what constitutes those particular crimes for which a President may be impeached (with the single exception of treason which is defined in the Constitution itself), it is evident that Congress may remove a President from office without the possibility of his appeal to any other authority, either the courts of justice or the people themselves.

There is no doubt that the process required for the enforcement of this control over the President is so difficult in its workings that it can hardly be resorted to as a means of affecting the ordinary political action of the President. The explanation of this fact, however, is to be sought in political and not in constitutional difficulties.

Nor is the statement in regard to other officials any more

nearly correct. There is, generally speaking, no legal responsibility of administrative officials in this country to the people, in any sense in which that term can be properly used. On the contrary, one may much better describe the system of government in the United States as one composed of many irresponsible officials, with power to check and hinder one another, a limit to whose irresponsibility is set simply by the fact that they have comparatively short terms of office, at the end of which they must be re-elected by the people in order to be continued in such office. But when one considers that, generally speaking, owing to the rapid change in tenure of political parties and the notion that rotation in office is an eminently democratic and desirable institution, good conduct in office does not lead to re-election, nor bad conduct necessarily to rejection, it is surely not proper to speak of political or legal responsibility to the people in any sense in which that term is ordinarily employed in political parlance. This description would apply fully to the systems of State government, and even in the case of the Federal Government, where owing to the power of the President to dismiss any official at will, complete administrative responsibility is assured, the officials are even further removed from any direct responsibility to the people than in the States. It is also a misstatement to speak of the federal judiciary as being legally responsible to the people. The only body to which they are in any sense responsible, except the courts themselves, is Congress, which may, by process of impeachment, remove them from office.

Such an exposition of this subject is not only open to objection, as not stating the actual facts of the case and as likely to be misleading to foreign students of our politics; but still more so because the habit which is widespread in this country of speaking of our officials as being responsible to the people, is one which leads the public to believe that they really are so, and it makes it difficult to secure public interest in proposed schemes for more efficient administration.

We imagine that, under our present organization, we have an effective control over public officials, whereas the whole history of our politics and law bears out the statement that no such control really exists as is implied by the expression that officials are responsible to the people. A most startling illustration of the ineffectiveness of popular control is given in a recent number of the ANNALS.* Mr. S. E. Moffett there describes the efforts of the people of California to secure action of a certain kind by a railroad commission. Although the members of this commission are elected by the people, and although the people seemed to be determined to secure action in accordance with their wishes—if there is any standard by which we may judge such determination—yet in spite of repeated elections, in spite of rejecting time and again every member of the commission who sought re-election after failing to comply with the popular demand, the people of California after more than a decade of effort are no further along than they were at the beginning.†

The exposition which the author gives of the judicial system of the United States, especially as relating to the federal judiciary, is not satisfactory. It is a complicated and difficult question about which few Americans, outside of the legal profession, concern themselves at all, and it has never ceased to be a *pons asinorum* for European jurists. Professor Bryce evidently understands the situation himself, but he does not make his exposition as clear as could be desired.

He gives in one place‡ a summary of the chief common or national matters which fall within the jurisdiction of the

* November, 1895, Vol. vi. p. 469.

† "The idea that officers are directly 'responsible' to the people and to no one else has, among our own citizens, diverted attention from a grave defect in our State government, viz: that most of the officials, such as sheriffs, states attorneys, attorneys-general, auditors, etc., are responsible to nobody. It is a sheriff's duty to suppress riots. Suppose that he sympathizes with the rioters or desires their votes and so does not suppress their disorder; to whom is he responsible for this misfeasance? To nobody."—Meritt Starr.

‡ P. 33.

national government, and declares at the end that this "list includes the subjects upon which the national legislature has the right to legislate, the national executive to enforce the federal laws and generally to act in defence of national interests, and the national judiciary to adjudicate." This seems to imply, in the very form of the statement, that the function of the federal judiciary is not only primarily, but exclusively, to pass upon cases in which the Federal Constitution or federal laws are involved.

In another place he declares* that "sometimes a plaintiff who has brought action into a State court finds, when the case has gone a certain length, that a point of federal law turns up which entitles either himself or the defendant to transfer it to a federal court, or to appeal to such a court should the decision have gone against the applicability of the federal law. . . . Within its proper sphere of pure State law, and, of course, the great bulk of the cases turn on pure State law, there is no appeal from a State court to a federal court."

When discussing the State judiciary,† the author declares that "the jurisdiction of the State courts, both civil and criminal, is absolutely unlimited, that is, there is no appeal from them to the federal courts, except in certain cases specified by the Federal Constitution, *being cases in which some point of federal law arises.*" (The italics are the writer's.)

In mentioning the points in which the legal independence and right of self-government of the several States appears, the author says‡ that "each of the forty-four States has its own court from which no appeal lies (*except in cases touching federal legislation or the Federal Constitution*) to any federal court." (The italics again are the writer's.)

There is in all this, and other similar statements may be found in the work, no indication whatever that one of the

* P. 332.
† P. 502.
‡ P. 419.

chief functions of the federal judiciary is to pass upon and administer State law. Indeed, the implication, or rather statement, is very distinct that the function of the federal courts is limited to deciding cases in which some point concerning the federal laws or the Federal Constitution may be raised.

There are, it is true, references to the fact that certain classes of cases are transferred to the federal courts* because the States cannot be trusted to do complete justice between their own citizens and those of another State. The clause in the Federal Constitution relating to the federal judicial power over controversies between citizens of different States is quoted at length,† and in another place‡ the express statement is made that "a plaintiff who thinks local prejudice will befriend him will choose the State court, but the defendant may have the case removed to a federal court if he be a citizen of another State or an alien, or if the question at issue is such as to give federal jurisdiction."

These latter passages indicate that Mr. Bryce himself understands the case, but surely the former passages, with the express statement that the function of the federal judiciary is limited to federal law, using that term to include constitutional as well as statute, can hardly be reconciled with the latter in such a way as to leave a clear impression upon the mind of the foreign student, or indeed upon the mind of the American student, unless from some special course of study or legal training he may have come to understand the situation.

If the author is speaking in the above passages only of appellate jurisdiction in the strictly legal sense of the term, his exposition is substantially accurate, of course; but in this case the exposition as a whole is confusing to all except the trained lawyer.

It is an interesting feature of our federal system of government that the respective jurisdictions of the different

* P. 228.
† P. 234.
‡ P. 333, foot-note.

departments of the Federal Government are so very different. We should naturally expect, in the organization of a scheme of government with a distribution of powers, that the various departments—legislative, executive and judicial—should be co-extensive in their competence; that the executive should be engaged in enforcing those laws, and only those laws, which the legislative power might be authorized to pass, and that the judiciary should be engaged in the settlement of disputes involving those laws, and only those laws, which the legislature might pass and the executive might enforce.

But in the case of the Federal Government of the United States, the competence of the judicial authority is almost indefinitely greater than that of the legislature, arising from the fact that its jurisdiction extends not only to suits at law or equity coming under federal law, using that term in the broadest sense, but also all cases at law or equity, no matter what the point of law involved, whether State or national, arising between citizens of different States. Its jurisdiction turns, in other words, not merely upon the subject-matter of the issue involved, but also upon the nature of the parties to the suit. A dispute arising between a citizen of Pennsylvania and a citizen of New York about the meaning and force of a contract made under Pennsylvania law and to be performed in Pennsylvania, is surely a question of pure State law, as that term would be understood by either lawyer or layman. There is no question that Pennsylvania law and only Pennsylvania law would apply;* within certain limits Pennsylvania precedents would be followed, and yet such a controversy belongs to the jurisdiction of the federal courts. It is an interesting fact that considerably more than half the business before our federal courts relates to the decision of such questions, involving

* The federal courts have, however, in some cases gone so far in the direction of putting their own interpretation on what State law is that they have built up a sort of federal law by construction on matters which are not otherwise entrusted to the Federal Government at all; notably subjects falling within the general field of commercial law.

pure State law with no admixture of federal law whatever. Some authorities, indeed, claim that the federal courts spend three-fourths, and others say five-sixths, of their time in the consideration of such questions. Of this important feature of our judicial system—one of the most characteristic and significant of them all—the foreigner would get no adequate, and it would be extremely doubtful whether he would get even a correct, idea from Mr. Bryce's exposition.

In discussing the distribution of powers between the national and State governments and the method of interpretation by which we determine what powers are to be assigned to one and what to the other, the author declares* that "a lawyer may think it was equally unnecessary and, so to speak, inartistic, to lay any prohibitions on the national government, because it could *ex-hypothesi* exercise no powers not *expressly* granted."

In another place † the author says that "a State is not deemed to be subject to any restriction which the Constitution has not *distinctly* imposed." In the same connection he states it to be the rule ‡ that "when a question arises whether the national government possesses a particular power, proof must be given that the power was *positively* granted." (The italics are the writer's.)

The impression which one might get from the first statement that our established constitutional doctrine is to the effect that the national government has only such powers as are expressly granted and which is strengthened by the other two passages quoted, is corrected by a positive statement § that "the grant need not be expressed, for it has frequently been held that a power incidental or instrumental to a power expressly given may be conferred upon Congress by necessary implication." But that this is an inadequate correction made in this incidental way, appearing only in a

* P. 313.
† P. 318.
‡ P. 319.
§ P. 329 foot-note.

foot-note, is evident from the fact that Mr. Bryce has been quoted as supporting the first doctrine indicated.

The necessity for this correction, recognizing the implied powers, and for giving expression thereto in connection with the original statement of its powers is apparent when it is considered that an exceedingly important portion of the acts in exercise of federal powers fall under the head of those granted by implication rather than by express mention.

The statement that the State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed, is an erroneous one, for not even the federal courts themselves, nor, so far as I know, any individual judge, has ever held that the prohibition upon the States to tax federal bonds, federal property, the income of federal office-holders, etc., is even suggested by any distinct provision of the Constitution, although all the courts have taken essentially the same view as to the existence of this prohibition growing out of the general nature of our dual system of government. The latter fact is mentioned by the author,* but is not brought into any organic connection with the statement above quoted. So of the doctrine mentioned below, that the grant of control of interstate commerce to the Federal Government impliedly withdraws it from the field of State legislation.

Nor is the author's attempt to delimit the federal power in relation to the police power of the State † quite successful. He declares that "Congress must not attempt to interfere with the so-called police power of the States within their own limits." The statement is correct in the form in which it is put if its limitations be understood, but it might imply to a foreigner that any act of Congress which interfered with the police power of the States within their own limits would be unconstitutional; which is not true. The courts have held that when the Federal Constitution gives to Congress authority to legislate upon any subject, the fact that such

* P. 520.
† P. 319 foot-note.

legislation interferes with the autonomy of the States in other departments which have been left beyond the control of the Federal Government, shall not be construed in such a way as to make such legislation unconstitutional. And, consequently, it may, and does, frequently happen that the incidental effects of the exercise of acknowledged constitutional powers on the part of Congress limit very seriously such action within domains which are considered as being purely matters of State concern. Thus Congress may regulate commerce in such a way as to interfere most decidedly with the police power of the States, and, indeed, the courts have held that the absence of legislation on the part of Congress implies that interstate commerce shall be free and must not be restricted as an incident to the exercise of the police power on the part of the States.*

In treating of the final authority in the interpretation of the Constitution of the United States, the author declares † that "the only authority competent to decide finally on the constitutionality of an act of Congress or of the national executive, is the federal judiciary." This is modified by the exception of purely political questions,‡ and, in an entirely different part of the work under a different head, the author expresses himself as follows: § "It is, therefore, an error to suppose that the judiciary is the only interpreter of the Constitution, for a certain field remains open to the

*Cf. Leisy v. Hardin, 135, U. S. Rep., 109. "Whenever, however, a particular power of the general government is one which must necessarily be exercised by it and Congress remains silent; this is not only not a concession that the powers reserved by the State may be exerted as if the specific power had not been elsewhere reposed; but on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States can not be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting of the transportation, purchase, sale and exchange of commodities is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the State so to do, it thereby indicates its will that such commerce shall be free and untrammeled."

† P. 337.

‡ P. 337 foot-note and p. 262.

§ P. 374.

other authorities of the government, whose views need not coincide, so that a dispute between those authorities, although turning on the meaning of the Constitution, may be incapable of being settled by any legal proceeding. This causes no great confusion, because the decision, whether of the political or judicial authority, is conclusive, so far as regards the particular controversy or matter passed upon."

The impression given by this and similar passages which might be quoted, is that the Constitution of the United States has, on the whole, marked out a sphere of action within which the different departments, in the exercise of their constitutional functions, cannot come into serious conflict. It implies, therefore, that on the whole the peaceable and peaceful working of the Constitution is exactly what might be expected from a consideration of its skillful adjustments. It seems, on the contrary, to be a much truer view that in this respect the Constitution is by no means consistent, that grave opportunities for conflict do exist, indeed, lie in the very nature of the political framework itself, and that the reason for its peaceful working thus far is to be found not in the excellence of its mechanical adjustments, but in the political good sense and training of the American people.

Passing over for a moment a discussion of "What is a political question?" the Constitution itself does not provide, in so many words, for a final authority in its interpretation. It is, therefore, a matter of inference, of construction, to determine what is the final authority in the interpretation of the instrument. It would seem that that is the final authority in the interpretation of any political instrument which is authorized by that instrument, indeed, required by it, to put an interpretation upon its provisions, and whose interpretation or construction is not subject to the revision of any other body.

If we accept such a definition, we shall find that there are several final interpreters of the Constitution, and in the work of construction it is by no means necessary that an

harmonious co-operation of these different authorities is to be accepted, as the only, or even natural, outcome. Thus, the Constitution of the United States provides that no person shall be a member of the House of Representatives who has not been a citizen of the United States for seven years, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. It provides also that the House of Representatives shall be the final judge of the elections, returns and qualifications of its own members. This gives to the House of Representatives the final authority to interpret the meaning of the word "inhabitant," subject to no revision by any other body. The same provision exists in regard to the Senate, and it might very well be that the House of Representatives should exclude a man from membership on the ground that he was not an inhabitant, and if he were elected to the Senate be admitted to that body on the ground that such objection was not valid; *i. e.*, the two bodies might put entirely different interpretations upon the meaning of the word "inhabitant," and their decisions being subject to no revision would be final. Of course, in such a case as this, no great harm would probably follow from conflicting decisions.

Prior to the adoption of the Fourteenth Amendment with its authoritative definition of a citizen, the House of Representatives might have excluded a free colored man from membership on the ground that negroes could not be citizens of the United States; the Senate might have admitted him on the ground that color was not a qualification of citizenship; the federal courts might have refused to entertain suits brought by him on the ground that no member of the African race was or could be made a citizen of the United States by act, either of the Federal or State governments (Dred Scott case).

The House of Representatives is given the authority to impeach any officer of the United States for treason, felony, or other high crime and misdemeanor. The Senate is given

the power to judge such cases, and at no stage in the proceeding can such a case as this be transferred so as to make it subject to the revision of any other authority; but in the decision of such a case, the construction or interpretation of the meaning of treason, felony, high crime and misdemeanor, would come up and have to be decided, since it would be necessary to the decision of guilt. Surely these are cases in which the final authority in the interpretation of the Constitution is not to be found in the judicial department, and yet they can hardly be called political, in the sense ordinarily given to that term by the courts. The decision of a contested election case turns upon questions of law, pure and simple; but all such decisions are referred to the respective Houses of Congress. Other cases might be quoted, but this is sufficient for the immediate purpose.

Now, it would be perfectly possible to get a series of decisions by the different authorities of our government which could hardly be reconciled under our present system of constitutional law. Suppose in a State election three parties appear claiming to have elected a governor and a legislature, that these three bodies meet and proceed to transact the ordinary business devolving upon the legislature, each electing a United States Senator and passing a body of laws relating, let us say, to contracts. Suppose a disturbance breaks out resulting in civil war within the State and an appeal is made to the President of the United States for assistance. He must, as an incident to interference, practically determine for himself the legitimacy of one or the other of these legislatures: suppose he acknowledges legislature "*A*." The persons who have been chosen Senators by these three bodies apply for admission to the Senate; the Senate recognizes the Senator as chosen by legislature "*B*" to be the legitimate one. Shortly after a case arises in the State courts between citizens of that State as to which body of laws is the true and legitimate body, and the courts of that State recognize legislature "*C*."

Now, let a case arise of a dispute between a citizen of that State and a citizen of another State as to the legitimacy of a contract made under one of these bodies of laws. The federal courts must pass upon the question. They are evidently on the horns of a dilemma; they have ruled that the decision of the question, Which of the contesting governments in the State is the legitimate one? is for the executive department of the Federal Government to decide, and if the President has decided it, by the recognition of the first government, the court would be bound by its own decisions to recognize as the law of the State an entirely different set of laws from those accepted by the highest judicial authority in the State itself. This would necessarily lead the court into conflict with another principle of procedure, generally acknowledged by it, according to which in passing upon matters of State law, the federal courts will follow the adjudications of the highest State courts.

To say, as one might, that such a case offers no difficulty from a legal point of view, because the executive department could recognize one government for its purposes and the courts another for their purposes does not change the fact that here is a fundamental conflict between the legitimate division of co-ordinate departments of the government relating to the same subject matter, which might in certain cases logically lead to a constitutional block.

One might urge, however, that such a question will never arise because the American people would not carry matters to such an extreme. This may be correct, but it simply proves that the peaceable and excellent working of our institutions is to be found in the political good sense of the American people, and not in the perfection of the constitutional adjustments made under our system. It is not too much to say that the Constitution of the United States would be worked with great difficulty by any other than a Teutonic nation. The legitimate power given by the Constitution in express or implied terms to each of the departments of the government

is so great, that if each department, in any struggle with other departments, insisted upon exercising all the power which is constitutionally vested in it, a hopeless block would be the result. No President would need greater authority than ours has in order to make the working of the government impossible, and, consequently, pave the way for revolution. No system of courts would need more authority than ours have claimed, practically to supersede the legislature, and, indeed, the executive also. To Congress, ample power has certainly been given to carry matters to such an extreme as to make the scheme unworkable. It is not because we have a consistent Constitution, or one which provides for all possible contingencies, or even one which does not allow most serious possibilities of conflict, that our government has worked; but solely because of what may be called the political genius of the people.

The manner in which the federal courts have drawn limits about their own jurisdiction in order to prevent them from coming into hopeless conflict with the executive and legislative departments of the government, by the development of the fiction to which they have given the name of "Political question," is a good illustration of this proposition.

In the chapter on the working of the courts, * the author raises the question as to "how judicial authorities can sustain the functions which America requires them to discharge. . . . . How can judges keep out of politics when political issues, raising party passions, come before them? Under such conditions as exist in the United States, must not the interpreting court be allowed to assume a control over the executive and legislative branches of the government, since it has the power of declaring their acts illegal?" His answer to this is, that "the latter possibility occurs very rarely and may be averted by the same prudence as the courts have hitherto generally shown. This prudence is

* P 261.

displayed,* especially in the refusal of the federal courts to interfere in purely political questions."

In discussing the authority competent to decide finally on the constitutionality of an act of Congress, the author declares that if the question be a purely political one, it may be incapable of being decided by any court whatever. These two statements seem to imply that the term "purely political questions" is one of so definite a nature as to be easily understood, and one which does not involve in itself the decision of a suit at law or equity.

In another passage† the author agrees that this term is a vague description, but does nothing to make it plainer by a more exact definition. If there were questions coming before the courts of a purely political nature, in the sense that they do not involve in their decision the determination of legal or constitutional questions, then it might be proper enough to say, as our courts do, and our commentators also, that the settlement of purely political questions does not belong to the courts; for the Constitution gives jurisdiction to the courts only over suits arising in law or equity. But, on the other hand, the real significance of this distinction which the courts have drawn, can only be ascertained from an examination of those cases in which there is no doubt that a suit in law or equity, not only might, but according to all legal and constitutional principles does arise, and which, therefore, brings the question as certainly within the jurisdiction of the courts as in the case of any of the disputes actually tried.

The question which of two opposing governments, each claiming to be the rightful government of a State, is the legitimate one, may ultimately give rise to a dispute between private citizens as to the legality of contracts made under the laws of either the one or the other government. The decision of cases of the latter kind the courts could not avoid,

* P. 262.
† P. 374.

and yet in deciding them would have to pass upon the very questions which they had perhaps previously ruled out as "political." The real explanation of the attitude of the courts is to be found in their unwillingness to take jurisdiction of cases, even though they be as purely suits at law or equity as any that are ever tried before them, which would, in their decision, and in the enforcement of that decision, bring the courts into a hopeless conflict with the other departments of the government. The author rightly says that the description could be made more specific only by an enumeration of the cases which have settled the practice. It is an involved point which for its full explication would need much more space than we can give it here.

In discussing the relation of the executive and legislative* it is stated that the initiative in foreign policy and the conduct of negotiations are left to the President by the Constitution. It is a fair question whether it was intended to give to the President any such authority in the negotiation of treaties as he has actually succeeded in securing to himself. It is declared in the Constitution that "he shall have power, by, and with, the advice and consent of the Senate, to make treaties." As far as the language is concerned this would seem to imply that the President should secure the advice and consent of the Senate, just as much in the negotiation as in the ratification of the treaty. Indeed, the only way in which the advice of the Senate could be made effective would be by the participation of the Senate in the original drafting of the treaty, as well as in the final ratification or assenting to its adoption. There is no doubt that if the custom had been adopted, of consulting the Senate in advance in regard to the negotiation of treaties, and no treaty had been negotiated to which the consent of the Senate had not been first obtained, the practical power of the Senate over the making of treaties would be very much greater than it is, and the practical power of

* P. 225.

the President would be very much less than it is, since the Senate, for reasons which will suggest themselves to every student of politics, would be much more willing to refuse its consent to the negotiation of a treaty which did not altogether commend itself to it, than to refuse its consent to a treaty which had already been negotiated and practically accepted by both governments. It would, under such a system, have acquired a practical power over the details of a treaty which it does not now possess. The arguments in favor of the view that the Senate is constitutionally entitled to the exercise of this power, however, are very cogent.*

The author's discussion of the power of Congress to make conditions as to the admission of territories as States, is not altogether satisfactory. Thus, in one place,† he declares that Congress may impose conditions which the State constitutions must fulfill, and in admitting the six newest States has affected to retain the power of maintaining these conditions in force. In another passage‡ he delares that "the enabling act may prescribe conditions to be fulfilled by the State constitution, but has not usually attempted to narrow the right which the citizens of the newly formed State will enjoy, by subsequently modifying that instrument in any way not inconsistent with the provisions of the Federal Constitution. However, in the case of the Dakotas, Montana, Washington, Idaho and Wyoming, the enabling act required the conventions to make by ordinance, irrevocable, without the consent of the United States, and the people of said States, certain provisions, including one for perfect religious toleration and another for the maintenance of public schools free from sectarian control. This the six States have done accordingly, but whether this requirement of the consent of Congress would be held binding if the people of the State should hereafter repeal the ordinances, *quaere*."

* Cf. the account of Washington's attempt to get the advice of the Senate as to an early treaty in John Quincy Adams "Diary."

† P. 431.

‡ P. 583.

There is perhaps some judicial authority for the uncertainty which the author seems to feel in regard to the constitutional law govering such cases. But, on the whole, it would seem as if at present there were a well understood constitutional rule which can be stated in a general way without taking one too much into detail. The Congress of the United States may make such conditions as it chooses in regard to the admission of a territory, to the status and condition of a State, but it is a legitimate conclusion from the nature of our government that no such conditions would be of any avail to limit the constitutional authority of the State, after the territory had once become such. It would seem that the doctrine of the Territory of Missouri, pronounced at the time of its admission, is good constitutional law. It claimed that, although the territory bound itself in the Constitution to do and to refrain from doing certain things, the State could not be held to the performance of such promises, and it repudiated in advance any sense of obligation to carry them out. There would seem to be no way by which a State can be driven out of the Union because it has failed to comply with the promises which were made by the territory prior to its admission as a State.

There are, however, certain points as to which the State could be held to the observance of a condition which the territory had accepted. Thus, if a territory, as a condition of its admission, agrees to accept a certain boundary as its boundary line, any attempt to serve its legal processes in the territory claimed would be overthrown by the simple process of appealing to the federal courts of the United States, on the part of any citizen or inhabitant of that territory who objected to the process, and the court, in deciding the suit against the officer who attempted to serve the process, would undoubtedly uphold an agreement of such a kind as a part of the fundamental law of the United States. Or, if a territory agrees to acknowledge the land grants made within its limits by another State or territory claiming the ownership

thereof, any attempt to invalidate or disregard the land grant would be met by an appeal on the part of the individual claiming it to the federal courts, and doubtless to the maintenance of such an agreement as part of the law of the United States. In other words, certain classes of agreements, not relating to the constitutional power of the State in its relation to the Federal Government, to the repudiation of which positive State action would be necessary, can properly be maintained as a part of the law of the United States (especially if they involve rights of property or persons), though they rest upon conditions imposed by Congress as to the admission of new States. All self-executing and automatic agreements would come under the same category. But an agreement on the part of a territory to pay money to private individuals could not be enforced against the State, if the only process allowed were a suit at law or equity against the State by a private party.

Political theorists, at least those of one school, would object to the author's exposition of the original relation between State and nation. The declaration that "America is a commonwealth of commonwealths, a State, which while one, is nevertheless composed of several States, *even more essential to its existence than it is to theirs*," * is fairly open to objection, whether meant as a statement of fact or of theory. Nor is the similar statement † that "the States have over their citizens an authority which is their own and not delegated by the central government; that they have not been called into being by that government; that they, that is the older ones among them, existed before it, that they could exist without it,"—a formulation of the federal and State relation which would be accepted by everybody.

The claim ‡ that "the authority of the State constitution does not flow from Congress, but from acceptance by the

* P. 15. The italics are the writer's.
† P. 17.
‡ P. 431.

citizens of the States for which they are made," may be true enough, but it hardly justifies the further claim that "of these instruments, therefore, no less than of the constitutions of the thirteen original States, we may say that, although subsequent in date to the Federal Constitution, they are, so far as each State is concerned *de jure* prior to it; their authority over their own citizens is in no wise derived from it."

This is, of course, a technical point of political theory upon which there have always been two distinctly opposing views, and one can, perhaps, not find fault with the author because he has accepted one instead of the other. But there is no indication in the work as a whole that there is any other view. There are difficulties in the way of elaborating a consistent theory along either line in regard to this matter. According to one theory, however, the thirteen original States, so far as our present political organization is concerned, owe their fundamental political powers, as to their own citizens on one hand and to the Federal Government on the other, to the organic act adopted by the people of the United States and known as the Federal Constitution, and, therefore, all the State constitutions, the original as well as the later ones, derive their authority not from Congress or the Federal Government—the author is perfectly right as to this, of course—but from the American people as a body expressing their will in the convention which drafted the Federal Constitution and in the conventions which ratified it. The fact that they existed before it does not change the fact that their subsequent existence depends upon it.

To say that the later States existed *de jure* before the nation and before the Federal Government, before the Federal Constitution, is inconsistent alike with fact, law and theory. The right of the people of a territory to be organized and admitted to the Union as a State is derived from the Federal Constitution. The true theory would seem to be that the people of the United States in 1787, and during the two following years, re-organized the American state,

constituted a dual system of government and in the classification of the functions enumerated those belonging to one part (the federal), provided a series of prohibitions upon both and left the residuum of governmental powers, or the unenumerated powers, to the States (or the people thereof) in existence at that time and to those which were expected to come into existence in the future. This was the theory underlying President Lincoln's first inaugural address.

From this point of view the powers of the States are as legitimately an outflow of the will of the nation under the protection, guarantee and limitation of the Federal Constitution as the powers of the Federal Government itself. As said above, such a theory is not, perhaps, altogether without difficulties in view of the historical facts, but it explains more of the historical facts upon a simple and uniform system than any other theory which has been advanced.

There are a few plain errors in the work which ought at least to be mentioned in such a review as this. The statement is made in one place* that "the only power which is ultimately sovereign, as the British Parliament is always and directly sovereign, is the people of the States acting in the manner prescribed by the Constitution and capable in that manner of passing any law whatever in the form of a constitutional amendment." This, of course, does not correspond to the facts of our political system, and, although the statement is corrected in another place in the chapter on the amendments to the Constitution,† in which the author says that there is one provision of the Constitution which cannot be changed by this process, that securing to each State equal representation in the Senate; yet the correct statement is brought into no organic connection with the preceding nor any reference made to it.

In discussing the prohibitions upon the Federal Government‡ it is stated that "the writ of habeas corpus may not

* P. 36.
† P. 365.
‡ P. 316.

be suspended, nor bill of attainder, nor *ex post facto* law passed." It is difficult to see how such a slip as this could have been made in the first place by such a competent authority as Mr. Bryce, and still more difficult to see how it could have escaped the attention of critics for so long a time. The provision of the Federal Constitution is, that "the privilege of the writ of habeas corpus shall not be suspended, unless, when, in cases of rebellion or invasion, the public safety may require it." So far from this being a prohibition upon the Federal Government, to suspend the privilege of the writ, it is in reality an acknowledgment of the power of the Federal Government to do so, by describing the conditions under which it may be done.

The subject is mentioned in one other place in the book,* where the author says that "some contests arose as to the right of officers in the federal army to disregard writs of habeas corpus issued by the court." The significance of this clause, as well as the long and bitter discussion which took place in Congress and the country over the power of the President to suspend the privilege of the writ, seems to have escaped the author altogether, otherwise such a serious error in fact could not have been made.

In making clear the constitution of the American Senate, the author says,† "that in the present Federal Council of the German Empire, in which each State votes as a whole, the number of her votes is proportioned to her population." This is a common statement which one finds repeated in the current literature of the time in regard to the German Federal Council; but it is erroneous. It is certainly not true of the Federal Council as it is at present constituted, even approximately, nor can one fairly say that it ever has been so. Article VI of the German Federal Constitution declares that, "the Federal Council shall consist of the representatives of the members of the federation, among

* P. 269.
† P. 102.

which the votes shall be distributed in the following manner," and then proceeds to give a list in which Prussia appears with 17 votes, Bavaria with 6, Saxony and Wurtemberg with 4 each, Baden and Hesse with 3 each, Mecklenburg-Schwerin and Brunswick with 2 each, the other States with 1 each, making altogether 58 votes. There is no provision by which this distribution of votes can ever be made different from what it is now and from what it was at the time of the establishment of the Empire. At present, although Prussia has only 17 votes out of 58, *i. e.*, less than one-third, it has over three-fifths of the population of the German Empire, and some of the other States are as much over-represented as Prussia is under-represented, if one takes population as a basis of distribution.

In the Constitutional Diet of 1867, Bismarck declared* that "Our distribution of votes (in the Federal Council) has in it something of the arbitrary. It is impossible to make population a basis of voting as is done in the Diet. The present distribution has one great advantage: it is fifty years old, and we have accustomed ourselves to it for fifty years." In other words, the present German Empire accepted the distribution which had been adopted in the Council of the former German confederation, founded in 1815, giving to Prussia not only the votes which it possessed at that time, but also those which belonged to the territory which had been subsequently incorporated in Prussia. This distribution was not based on population in the beginning and has never been adjusted to it since.

The difficulty which a foreigner has in grasping the real significance of many of the provisions of our Federal Constitution is illustrated by the author's remarks† upon the forces which have acted to secure universal suffrage in the United States. He says that the differences which might exist between one State and another as to the right of

* Stenographic Report, p. 350.
† P. 486.

suffrage are at present insignificant, owing partly to the prevalence of Democratic theories of equality throughout the Union, and partly to the provision of the Fourteenth Amendment of the Federal Constitution, which reduces the representation of a State in the Federal House of Representatives, and therewith also its weight in a presidential election, in proportion to the number of adult male citizens disqualified in that State. For, as a State desires to have its full weight in national politics, it has a strong motive for the widest possible enlargement of its federal franchise, and this implies a corresponding width in its domestic franchise.

The Fourteenth Amendment is not, so far as this point is concerned, a self-acting provision of the Constitution. It declares that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

In other words, this is a provision requiring the Federal Government to reduce the basis of representation. This can only be done by a law to which the consent of both Houses and the President is necessary, unless a majority vote of two-thirds in each House can be obtained for the proposition. Any one familiar with our history for the last twenty-five years must be fully aware that the passage of such a law by the Federal Government belongs to the absolutely impossible things in American politics. The bold and wholesale way in which the Southern States—first, by illegal and illegitimate methods, and, one may say, unconstitutional methods, even when tested by State law alone,

subsequently by laws and amendments to the State constitutions themselves,—have disfranchised by the wholesale the classes of persons mentioned in this provision, shows how little fear they have that this amendment will ever be enforced. Indeed, it may be considered, for the present, as for all practical purposes, a dead letter. The State of Mississippi recently adopted a constitutional amendment practically disfranchising the colored citizens of that State by a process fully as revolutionary as that underlying our present Federal Constitution.

When the attempt was made to incorporate a provision in the law for taking the census in 1880, requiring the collectors to ascertain how many such citizens of the United States, twenty-one years of age, were prevented from voting in the several States, it was defeated, and the claim was boldly made that the provision of the Fourteenth Amendment, above referred to, neither would nor could be carried out.

Among the minor points which may be mentioned in such a criticism, is the author's statement in regard to the Dred Scott case. In discussing this case,* it is stated that "the doctrine of the Dred Scott judgment as to citizenship was expressly negatived in the Fourteenth Constitutional Amendment adopted after the War of Secession." This is not, strictly speaking, correct language, though one often finds it used in regard to this case. An amendment to the Constitution does not negative any constitutional doctrine advanced and acted upon by the courts prior to the amendment; it simply changes the law.† The only condition in which it would be proper to say that the doctrine was negatived, would be a reversal of the opinion of the same court in the same, or in a similar, case, by the court itself. As a matter of fact, the doctrine of the Supreme Court in this case was never negatived nor reversed. The executive

* P. 269.

† The Eleventh Amendment did this in form, but not in reality.

department disregarded it on one occasion; the lower courts refused in some cases to be bound by it; but it stood as the law of the land in spite of these facts until that law itself was changed in the constitutional manner by the adoption of the Fourteenth Amendment.

Nor is the statement in the same connection correct, that "the federal courts gave effect to most, though not to all, of the statutes passed by Congress under the three amendments which abolished slavery and secured the rights of the negroes." The Civil Rights acts, passed before and subsequent to these amendments, were in some of their most important features held to be unconstitutional by the courts, and the decisions allow to the States a large right of discrimination in their laws between the negroes and the whites. The courts have thus upheld the right of the States to discriminate in the most far-reaching way in the treatment accorded to different classes of its citizens as to some of the most fundamental rights of the individual—a discrimination which the Civil Rights Acts aimed to prevent.

It does not seem quite fair to make the statement* that "the Supreme Court now holds that the power of Congress to make paper money legal tender, is incident to the sovereignty of the national government." On the contrary, although there is room here for difference of opinion, it would be fairer to say that the court maintained that to the Federal Government had been entrusted, by the terms of the Constitution, sovereignty over the currency, and that in the exercise of this sovereignty it could perform any of the acts which other sovereignties at the time of the adoption of the Constitution were in the habit of performing, subject only to the expressed or implied restrictions of the Constitution. The view of the author seems rather to be based on the dissenting opinion of the court, or upon Mr. Bancroft's interpretation of the opinion, than on a careful study of the text itself.

* P. 390.

In setting forth the prohibitions on the national government,* it is stated that "no person shall be subjected to a second trial for the same offence." The language of the Constitution is that "no person shall be subject for the same offence to be twice put in jeopardy of life or limb." The highly technical meaning which our courts have put upon the term "to be put in jeopardy," does not always protect a person from a second trial for the same offence.

In discussing the nature of the State as contrasted with the Federal Government,† the author states that "a man gains active citizenship of the United States, that is, a share in the government of the Union, only by becoming a citizen of some particular State; being such a citizen he is forthwith entitled to the national franchise." This is one of the subjects upon which our own writers make such astonishing statements that one need not be surprised if a foreigner is led into error on the subject.

The Fourteenth Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This applies to women and children as much as it does to men, and, consequently the possession of citizenship in a State does not at all imply the possession of the elective franchise, either in that State or in the nation. In fact, there is so little organic relation between the right of citizenship and the right of voting in the United States, that one is almost tempted to say that they have nothing to do with each other. The author explains in the very same section in which he is discussing this subject, that the States may grant the right to vote to persons who are not citizens of the United States or even of the States. They may limit the right to vote among their own citizens by an age condition, a sex condition, a property condition, an educational condition, indeed, by any kind of

* P. 317.
† P. 419.

a condition, except the single one of race, color, or previous condition of servitude.

If a State were to advance so far in its restriction of the suffrage as to destroy in the public opinion of the country a republican form of government, Congress might take action interfering with the liberty of the State in this respect. Of course, Congress might take action in the way of reducing the representation of the State in the House of Representatives, in case any other condition than that of sex, age and citizenship should be set to the exercise of the suffrage; but, as we have seen above, owing to the way in which the penalty must be inflicted, if inflicted at all, this is practically no restriction upon the State.

In closing this long and somewhat unsystematic critique of the work, the writer would like to emphasize what was said at the opening of the paper, and to call attention to the fact that many of the inconsistencies and slips which appear in the book, are almost an inseparable feature of the system of exposition which the author has adopted. In order to give a general idea he has made many preliminary statements in different parts of the work; then followed them up in other portions by more detailed statements; and anticipated and repeated in many different passages what was to be said, or what had been said, in others, and it would be little short of a miracle if under such a method many mistakes had not crept in; it is only remarkable that there are so few. We must be content to yield to the system of exposition adopted, the defects of its virtues.

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